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Public Prosecutor v Habib Jewels Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — CRIMINAL CASE NO WA-44–148–06 OF 2019
MOHD NAZLAN J
10 FEBRUARY 2020

C *Criminal Law — Forfeiture — Forfeiture order — Applicant applied for forfeiture order for sum of monies under ss 56 and 61 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 — Whether there was commission of predicate offence — Whether monies received by respondent for valuable consideration in good faith — Whether respondent had no involvement* D *in the commission of any offence and did not aid or abet any such offence — Whether applicant failed to show which monies were from illegal as compared to legitimate sources — Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 56 & 61*

E This was an application by the applicant pursuant to ss 56(1) and 61(2) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act') for a forfeiture order against the respondent for the sum of monies amounting to RM100,000 and the accrued interest thereon in one of the respondent's RHB Bank current accounts. The application arose F from the investigations into the involvement of the former Prime Minister, Dato' Sri Mohd Najib bin Tun Hj Abdul Razak ('DSN') in relation to the affairs of government-owned corporate entity, 1Malaysia Development Bhd ('1MDB'). The applicant claimed that there were many transactions involving transfer of funds into the personal bank account of DSN, which funds were G suspected to have been diverted from 1MDB, and the subsequent transfers to amongst other bank accounts of DSN, and the payments out of these accounts in favour of various other parties. The respondent was, according to the applicant, one of the recipients of such monies from DSN. The applicant had under ss 50 and 44 of the Act managed to freeze and seized the relevant sum of H monies standing to the credit of that account of the first respondent and thereafter filed the instant proceedings. In November 2013 and June 2014, the respondent received two cheques issued by DSN himself for the sale of jewellery from the respondent to DSN. On or around 21 September 2018, as stated earlier, the applicant invoked its powers under s 50 of the Act to seize the I monies in the sum of RM485.66 in Account A and RM100,000 in Account B, both belonging to the respondent. The affidavit affirmed by the investigating officer for the forfeiture stated that the relevant branch of RHB Bank confirmed that the latest balance of these accounts of the respondent upon their seizure was only RM485.66 in Account A but RM2,011,214.48 in

Account B, respectively. The applicant alleged that DSN had used his position to obtain gratification, thereby committing an offence under s 23 of the MACC Act. The applicant, however in an amended notice of motion later applied to remove its application in respect of the seized monies in the sum of RM485.66 in Account A, which was allowed by the court. The applicant sought to forfeit the sum of RM100,000 in the respondent's Account B. The requisite third party notice was also ordered to be issued by the court in pursuance of s 61 of the Act and accordingly published in the relevant Federal Government *Gazette*. On the return date of the third party notice, no third party was present to claim interest in the monies of RM100,000 now sought to be forfeited. The issue were: (a) whether there wascommission of predicate offence; (b) whether the monies were received by the respondent for valuable consideration in good faith; and (c) whether the respondent had no involvement in the commission of any offence and did not aid or abet any suchoffence and whether the applicant failed to show which monies were from illegal as compared to legitimate sources as they had mixed.

Held, dismissing the applicant's application:

(1) In respect of the question as to whether the predicate offence under s 23 of the MACC Act was committed by DSN, on a balance of probabilities, the court found that the affidavits which have been affirmed by the investigating officers, especially on the predicate offence of the said s 23 in support of the forfeiture, although extensive and detailed, merely disclosed the movements of the monies deposited into and transferred out of the accounts of DSN and certain other entities. It appeared that the case on the commission of an offence under s 23 of the MACC Act was lacking in terms of the adequacy of substantiation and other extrinsic evidence. Insufficiency of evidence could not justify the court was satisfied that the requirements of s 56(2) of the Act had been met in order to grant an order for forfeiture (see paras 35, 40 & 46).

(2) The respondent had successfully discharged the burden of showing that the monies were derived from legitimate sources in the course of its business and the applicant failed to reply or rebut meaningfully with any evidence that such monies were not received by the respondent in good faith and for valuable consideration. An order for forfeiture could not be made if there is a purchaser in good faith for valuable consideration in respect of the property (see paras 62 & 64).

(3) The invocation of s 56 of the Act did not require that the recipient of the proceeds from unlawful activity must somehow have colluded or involved in the wrongdoing related to the commission of the predicate offence or the money laundering offence. The respondent's allusion which stated that the recipient of the property subject to a forfeiture application under must have been involved in the aiding and abetting the

money laundering or predicate offence was misconceived. A forfeiture could be ordered when the recipient was wholly innocent (see paras 69–70).

(4) The nexus between the proceeds attributed to DSN from the predicate offence and the monies sought to be forfeited was manifestly conspicuous in its absence. The applicant had not succeeded to discharge its burden of proving on the balance of probabilities that the monies sought to be forfeited were proceeds of an unlawful activity or the subject-matter or evidence relating to a predicate offence (see para 83).

[Bahasa Malaysia summary

Ini merupakan permohonan pemohon dibawah ss 56(1) dan 61(2) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil dari Aktiviti Haram 2001 ('Akta') untuk perintah pelucuthakkan untuk wang berjumlah RM100,000 dan telah terakru daripadanya dalam salah satu akaun RHB milik responden. Permohonan ini timbul daripada siasatan terhadap bekas Perdana Menteri, Dato' Sri Mohd Najib bin Tun Hj Abd Razak ('DSN') berkaitan dengan hal entiti milik kerajaan 1Malaysia Development Bhd ('1MDB'). Permohon mengatakan bahawa terdapat banyak transaksi melibatkan pemindahan wang daripada akaun peribadi milik DSN, yang mana wang tersebut disyaki telah diselewang dari 1MDB, dan pemindahan seterusnya dari akaun bank DSN, dan pembayaran keluar dari akaun ini yang memihak kepada pihak-pihak lain. Pada November 2013 dan Jun 2014, responden menerima dua cek yang dikeluarkan oleh DSN sendiri untuk penjualan barang kemas daripada responden kepada DSN. Pada atau sekitar 21 September 2018, sepertimana yang dikatakan terdahulu, pemohon mengunakan kuasanya dibawah s 50 Akta tersebut untuk merampas wang dalam jumlah RM485.66 dalam Akaun A dan RM100,000 dalam Akaun B, yang kedua-dua milik responden. Afidavit yang diikrarkan oleh pegawai penyiasat untuk pelucuthakkan menyatakan bahawa cawangan berkaitan RHB Bank mengesahkan bahawa baki terkini akaun tersebut milik responden pada waktu rampasan hanyalah RM485.66 dalam Akaun A tetapi RM2,011,214.48 dalam Akaun B. Pemohon mengatakan bahawa DSN telah menggunakan kedudukanya untuk mendapatkan suapan, oleh yang demikian melakukan satu kesalahan dibawah s 23 Akta SPRM. Pemohon, dalam satu notis usul kemudiannya memohon untuk menarik balik permohonannya berkaitan dengan wang dalam jumlah RM485.66 dalam Akaun A, yang dibenarkan oleh mahkamah. Pemohon memohon untuk melucuthakkan jumlah RM100,00 dalam Akaun B responden. Notis pihak ketiga yang diperlukan juga diperintahkan untuk dikeluarkan oleh mahkamah selaras dengan s 61 Akta tersebut dan telah dengan itu diterbitkan dalam *Warta* Kerajaan Persekutuan yang berkaitan. Pada tarikh kembali notis pihak ketiga tersebut, tiada pihak ketiga hadir untuk menuntut kepentingan dalam wang RM100,000 yang kini ingin dilucuthakkan. Isu adalah: (a) sama ada wujud

satu pelakuan kesalahan predikat; (b) sama ada wang yang diterima oleh responden adalah untuk balasan bernilai dengan niat baik; dan (c) sama ada responden mempunyai apa-apa penglibatan dalam pelakuan apa-apa kesalahan dan tidak membantu atau bersubahat kesalahan tersebut dan sama ada pemohon gagal untuk menunjukan wang mana berasal dari sumbar haram berbanding dengan sumber sah yang kerana ianya telah dicampur.

Diputuskan, mengetepikan permohonan pemohon:

(1) Berkaitan dengan persoalan sama ada kesalahan predikat dibawah s 23 Akta SPRM telah dilakukan oleh DSN, atas imbangan kebarangkalian, mahkamah mendapat bahawa afidavit yang telah diikrarkan oleh pegawai penyiasat, terutama atas kesalahan predikat s 23 Akta SPRM adalah tidak memadai berkaitan dengan sama ada pengesahan yang mencukupi dan keterangan ekstrinsik yang lain. Kekurangan keterangan tidak memadai untuk mahkamah berpuas hati bahawa keperluan s 56(2) Akta tersebut telah dipenuhi untuk membenarkan satu perintah pelucuthakkan (lihat perenggan 35, 40 & 46)

(2) Responden telah berjaya untuk melepaskan beban untuk menunjukkan bahawa wang adalah diterima dari sumber sah dalam perjalanan perniagaannya dan pemohon gagal untuk membalas atau mematahkan dengan bermakna apa-apa keterangan bahawa wang demikian tidak diterima oleh responden dengan niat baik atau untuk balasan bernilai. Satu perintah untuk pelucuthakkan tidak boleh dibuat sekiranya wujud pembeli berniat baik untuk balasan bernilai berkaitan dengan harta tersebut (lihat perenggan 62 & 64).

(3) Penggunaan s 56 Akta tidak memerlukan penerima hasil daripada aktiviti haram harus telah bersubahat atau terlibat dengan salah laku berkaitan dengan pelakuan kesalahan predikat atau kesalahan penggubahan wang haram. Pengataan responden yang menyatakan bahawa penerima harta yang berhadapan dengan tindakan pelucuthakkan haruslah terlibat dengan membantu atau bersubahat dengan kesalahan penggubahan wang haram atau kesalahan predikat tersebut adalah salah. Satu pelucuthakkan boleh diperintahkan apabila penerima adalah tidak bersalah (lihat perenggan 69–70).

(4) Nexus antara hasil yang bersumber daripada DSN untuk kesalahan predikat dan wang yang cuba untuk dilucuthakkan adalah senang untuk dilihat dalam ketiadaannya. Pemohon gagal untuk melepaskan beban untuk membuktikan atas imbangan kebarangkalian bahwa wang yang ingin dilucuthakkan adalah hasil daripada aktiviti haram atau hal perkara keterangan berkaitan dengan kesalahan predikat (lihat perenggan 83).]

Cases referred to

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Noor Ismahanum Mohd Ismail v Public Prosecutor [2019] 2 MLJ 536; [2018] 10 CLJ 597, CA (refd)
PP v Billion Nova Sdn Bhd & Ors [2016] MLJU 1823; [2016] 2 CLJ 763, CA (refd)
PP v Kuala Dimensi Sdn Bhd & Ors [2018] 6 MLJ 37, CA (folld)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 4, 4(1), (1), (1)(a), (1)(b), (1)(c), (1)(d), 44, 50, 55, 55(2), 56, 56(1), (1)(a), (1)(c), (2), (2)(a)(i), (2)(a)(iii), (4), 61, 61(2), 70, Second Schedule
Federal Constitution art 13
Malaysian Anti-Corruption Commission Act 2009 s 23

Allan Suman (Maziah bt Mohaide and Abdul Rashid bin Sulaiman with him) (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission) for the applicant.
Khoo Guan Huat (Gooi Yang Shuh with him) (Skrine) for the respondent.

Mohd Nazlan J:

INTRODUCTION

[1] This is a forfeiture application under s 56 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUAA').

[2] I decided to dismiss the application. These are the full reasons for my decision.

BACKGROUND FACTS

[3] This is an application by the applicant pursuant to ss 56(1) and 61(2) of the AMLATFPUAA for a forfeiture order against the respondent for the sum of monies amounting to RM100,000 and the accrued interest thereon in one of the respondent's RHB Bank current accounts.

[4] In essence, this application arose from the investigations into the involvement of the former Prime Minister, Dato' Sri Mohd Najib bin Tun Hj Abdul Razak ('DSN') in relation to the affairs of government-owned corporate entity — 1Malaysia Development Bhd ('1MDB'). The applicant claimed that there were many transactions involving transfer of funds into the personal bank account of DSN, which funds were suspected to have been diverted from

1MDB, and the subsequent transfers to amongst other bank accounts of DSN, and the payments out of these accounts in favour of various other parties.

[5] The affidavits of the investigating officers for both the predicate offence and the money laundering offence in support of this forfeiture application seek to show that there were large sums of monies transferred into the account of DSN, which the applicant maintained was unreasonable for DSN who at the material time held the office of the Prime Minister to have received such large sums of monies into his personal account.

[6] The applicant alleged that DSN in his capacity as the Chairman of the Board of Advisors of 1MDB and as the Minister of Finance had committed the offence of using his position or office for gratification under s 23 of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act'). Criminal prosecution has been instituted against DSN for offences related to 1MDB which include charges for the said s 23 offence. The trial is presently on-going.

[7] The respondent was, according to the applicant, one of the recipients of such monies from DSN. The applicant had under ss 50 and 44 of the AMLATFPUAA managed to freeze and seized the relevant sum of monies standing to the credit of that account of the first respondent and thereafter filed the instant proceedings.

[8] The respondent is a company which is principally involved in the business of selling and dealing in jewellery, gold and gemstones. In November 2013 and June 2014, the respondent received two cheques issued by DSN himself for the sale of jewellery from the respondent to DSN.

[9] Specifically these were first, a payment by way of an AmIslamic Bank cheque No 000094 dated 27 November 2013 for RM90,000 which was deposited into the respondent's RHB current account ('Account A'); and secondly, another AmIslamic Bank cheque No 000377 dated 23 June 2014 for RM100,000 which was deposited into another of the respondent's RHB current account ('Account B').

[10] On or around 21 September 2018, as stated earlier, the applicant invoked its powers under s 50 of the AMLATFPUAA to seize the monies in the sum of RM485.66 in Account A and RM100,000 in Account B, both belonging to the respondent. The affidavit affirmed by the investigating officer for the forfeiture stated that the relevant branch of RHB Bank confirmed that the latest balance of these accounts of the respondent upon their seizure was only RM485.66 in Account A but RM2,011,214.48 in Account B, respectively.

[11] As such for Account A, the applicant sought to forfeit the exact amount presently standing in that account even though the impugned monies from DSN that allegedly entered into Account A was very much more. Conversely, for Account B, the applicant sought to forfeit the exact amount of the impugned sum of monies from DSN, and that the balance in that account was in any event very considerably much more than that.

[12] On 24 June 2019, the applicant filed this instant forfeiture application pursuant to s 56(1) of the AMLATFPUAA to forfeit the seized monies from both Accounts A and B on the basis that the seized monies are the subject-matter or evidence relating to the commission of an offence under s 4(1) of the AMLATFPUAA or that such monies are the proceeds of an unlawful activity committed by DSN. The applicant alleged that DSN had used his position to obtain gratification, thereby committing an offence under s 23 of the MACC Act.

[13] The applicant, however in an amended notice of motion later applied to remove its application in respect of the seized monies in the sum of RM485.66 in Account A, which was allowed by this court. Thus, the applicant now only seeks to forfeit the sum of RM100,000 in the respondent's Account B.

[14] The requisite third party notice was also ordered to be issued by this court in pursuance of s 61 of the AMLATFPUAA and accordingly published in the relevant Federal Government *Gazette*. On the return date of the third party notice, no third party was present to claim interest in the monies of RM100,000 now sought to be forfeited.

THE ESSENCE OF THE CONTENTIONS OF THE PARTIES

[15] The respondents put forward four arguments to resist this forfeiture action. First, it argues that the applicant failed to show that a predicate offence has been committed; secondly, the monies sought to be forfeited had been received by the respondent for valuable consideration in good faith for the lawful sale and purchase of jewellery in the ordinary course of business; thirdly, the respondent had no involvement in the commission of any offence and did not aid or abet any such offence; and fourthly, that the monies sought to be forfeited had been mixed together with other monies from legitimate sources and the applicant has failed to show which monies were from illegal as compared to legitimate sources.

[16] The applicant rejects these arguments.

EVALUATION AND FINDINGS OF THIS COURT

[17] I will now deal with the grounds proffered by the respondent to oppose this forfeiture. The first two are the more important.

Whether there is commission of predicate offence

[18] This is a very key question in any forfeiture proceedings under s 56 of the AMLATFPUAA, which reads as follows:

> 56 Forfeiture of property where there is no prosecution
>
> (1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is —
>
> (a) the subject-matter or evidence relating to the commission of such offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence.
>
> (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied —
>
> (a) that the property is —
>
> (i) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
>
> (ii) terrorist property;
>
> (iii) the proceeds of an unlawful activity; or
>
> (iv) the instrumentalities of an offence; and
>
> (b) that there is no purchaser in good faith for valuable consideration in respect of the property.
>
> (3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.
>
> (4) In determining whether the property is —
>
> (a) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence,

the court shall apply the standard of proof required in civil proceedings.

[19] It is clear that an order for forfeiture under s 56 can for present purposes only be made by the court if the property sought to be forfeited is the subject-matter of a money laundering offence or proceeds of unlawful activity, and there is no purchaser in good faith for valuable consideration in respect of the property.

[20] The property in question must thus be the subject matter of a money laundering offence or proceeds of an unlawful activity. What is money laundering? The relevant parts of s 4 states:

4 Offence of money laundering

(1) Any person who —

(a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;

(c) removes from or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or

(d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence,

commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

[21] Any of the conduct stated in s 4(1)(a), (b), (c) and (d) may amount to a money laundering offence. Significantly, in each of the said money laundering offence, the prerequisite specified in the respective paragraphs of sub-ss 4(1)(a), (b), (c) and (d) is that there must be proceeds of an unlawful activity (or instrumentalities of an offence). And the position is virtually the same for the definition of money laundering before the amendment which resulted in the present s 4(1).

[22] This is a very crucial aspect that the applicant must establish. I must refer again to the provision of s 56 as stated earlier. In essence for present

purposes it is stated under s 56(2) of the AMLATFPUAA that the judge to whom an application is made under sub-s (1) shall make an order for the forfeiture of the property if he is satisfied that the property sought to be forfeited is among others the subject-matter or evidence relating to the commission of a money laundering offence under sub-s 4(1) or that it is the proceeds of an unlawful activity.

[23] And under s 56(4) of AMLATFPUAA, in determining whether the property is the subject-matter or evidence relating to the commission of an offence or the proceeds of an unlawful activity, the court shall apply the standard of proof required in civil proceedings. This is further repeated in s 70 of the same Act.

[24] It thus bears emphasis that the property sought to be forfeited must be the subject matter of the offence of money laundering or the proceeds of an unlawful activity. This is the crux of the matter. The subject of the forfeiture application before me is the sum of monies amounting to RM100,000 in Account B of the respondent.

[25] The fundamental question to be asked therefore is whether this sum of money is property which is the subject matter of the offence of money laundering or the proceeds of an unlawful activity. I have already made the point that it is an essential ingredient of money laundering that there must be proceeds of unlawful activity. As such under s 56(2), whether the property is a subject matter or evidence of a money laundering offence or proceeds of an unlawful activity essentially means the same thing, in that for money laundering offence, it must also be shown there is proceeds of unlawful activity.

[26] As such, in general, under, say s 4(1) of the AMLATFPUAA, one who *receives* proceeds of an unlawful activity commits money laundering. The words 'proceeds of an unlawful activity' are also defined under s 3 of the AMLATFPUAA, as follows:

> 'proceeds of an unlawful activity' means any property, or any economic advantage or economic gain from such property, within or outside Malaysia —
>
> (a) which is wholly or partly —
>
> (i) derived or obtained, directly or indirectly, by any person from any unlawful activity;
>
> (ii) derived or obtained from a disposal or other dealings with the property referred to in subparagraph (i); or
>
> (iii) acquired using the property derived or obtained by any person through any disposal or other dealings referred to in subparagraph (i) or (ii); or

(b) which, wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in subparagraph (a)(i), (ii) or (iii), can be reasonably believed to be property falling within the scope of subparagraph (a)(i), (ii) or (iii);

[27] It is thus also manifest that the proceeds must relate to an unlawful activity which in turn is defined under s 3 of the AMLATFPUAA, as follows:

'unlawful activity' means —

(a) any activity which constitutes any serious offence or any foreign serious offence; or

(b) any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence or any foreign serious offence,

regardless whether such activity, wholly or partly, takes place within or outside Malaysia;

[28] And an unlawful activity basically refers to a 'serious offence' which is any one of the various and many offences listed in the Second Schedule to the AMLATFPUAA which includes s 23 on the offence of using office or position for gratification under the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act'). These offences listed in the Second Schedule are the predicate offences for the money laundering offence.

[29] This forfeiture action is predicated on an offence which was alleged to have been committed by DSN under s 23 of the MACC Act. This is averred in the affidavit of the investigating officer of the predicate offence, namely Nur Aida bt Arifin which was affirmed on 18 June 2019.

[30] It must be emphasised that given the provisions of the statute as stated in s 56 of AMLATFPUAA, and the meanings ascribed to the key concepts as just described, it is plain that the applicant must prove that the proceeds sought to be forfeited is derived from or concerned with an unlawful activity, being the serious offences or predicate offence, that in this case is s 23 of the MACC Act, has been committed, on a balance of probabilities.

[31] This is made clear by the Court of Appeal decision in *Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823; [2016] 2 CLJ 763 which stated thus:

[50] *... We need only say on this aspect that it will not be a far-fetched conclusion to put in a nutshell that there could not be proceeds of an unlawful activity where such unlawful*

activity has not been proven. There is not the slightest room for doubt that the appellant failed to prove that these cash deposits were proceeds of the offence of money laundering under s 4(1). The learned judge correctly decided that these cash deposits were not sufficient to prove the offence, the appellant would have to prove that the duty free cigarettes were in fact sold in Miri and Kota Kinabalu before an order of forfeiture in respect of the various sums in the 24 bank accounts could be made. We are driven to the inevitable conclusion that since the offence was not proved, this court would not countenance the forfeiture of the money seized by the appellant. The learned DPP had contended that s 119 of Act 235 would apply. We agree with the learned judge that the presumption in s 119 of Act 235 does not apply to a forfeiture proceedings under the AMLATFA. The presumption under s 119 of Act 235 only applies for the cause of forfeiture under the said Act. The forfeiture application in this appeal it must be stressed is under s 56 of the AMLATFA. (Emphasis added.)

[32] I am also reminded of the decision of the Court of Appeal in *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2018] 6 MLJ 37 which judgment includes the following pronouncements:

[56] Following from the above, and the affirmative deposition made by the PP in our instant case, it is incumbent upon the PP to make clear to this court, in its application for forfeiture under s 56 of the AMLATFA the following elements:

(a) *the existence of a predicate offence, the evidence and basis upon which the commission of the offence has been established;*

(b) *identify the proceeds or 'the subject-matter of' the predicate offences that are in the custody of the respondents;* and

(c) since the DPP has admitted that the four accused had committed money laundering, then in what manner the respondents have abetted them. (Emphasis added.)

[33] The case of the applicant is, in the main, that the affidavits of the investigating officers for the predicate offence and money laundering offence have showed that the impugned monies paid by DSN to the respondent and deposited into Account B were proceeds of an unlawful activity (s 23 of the MACC Act offence). This is now sought to be forfeited. The outcome of any decision in the 1MDB criminal trial has no effect on the applicant's present forfeiture application.

[34] On the predicate offence under s 23 of the MACC Act, the applicant maintains that it is unreasonable for DSN, who at the material time held the high office of the Prime Minister of the country to have received large sums of monies into his personal account, a part of which was deposited into the respondent's Account A and B.

[35] In my judgment, in respect of the question as to whether the predicate offence under s 23 of the MACC Act has been shown to have been committed by DSN, on a balance of probabilities, I find that the affidavits which have been affirmed by the investigating officers, especially on the predicate offence of the said s 23 in support of the forfeiture, although extensive and detailed, merely disclosed the movements of the monies deposited into and transferred out of the accounts of DSN and certain other entities. Do these sufficiently establish the commission by DSN of the predicate offence under s 23 of the MACC Act in order to establish the unlawful activity from which the proceeds was allegedly derived?

[36] In this context, I am assisted by the abovementioned decisions of the Court of Appeal which held that the mere setting out of the movement of monies is not sufficient evidence to prove that the property sought to be forfeited is proceeds from an unlawful activity (the predicate offence).

[37] Reference to the pertinent passages from the judgments in these cases would be apposite. Thus, in *Kuala Dimensi*, it was stated:

> [111] Supt Willey first affidavit merely sets out the movement of money from KDSB's and TMB's account/s to various other account/s. There is no proof that the money sought to be seized and forfeited were from the subject-matter of or was used in the commission of the offence of money laundering or that they are connected to the two predicate offences under ss 409 and 420 of the Penal Code.
>
> [112] The PP has tendered no evidence to prove, on the balance of probabilities, that the money and property sought to be forfeited, is in fact the proceeds from the predicate offences.

[38] A similar position prevailed in *Billion Nova* where it was ruled thus:

> [50] In our judgment, to prove the offence under s 4(1) of the AMLATFA, the predicate offence under s 135(1)(g) of Act 235 must first be proved. Mere proof of payments from the principal customs area without more, is not sufficient to prove the predicate offence under s 135(1)(g) of Act 235, hence the offence under s 4(1) of the AMLATFA. We agree with the learned judge that in the modern business world, payments could be made or banked in from any bank account or any part of the world for sales, transactions or purchases made elsewhere, at the convenience or choice of the payer and payee ...

[39] I accept the applicant's stance that the verdict in the 1MDB criminal trial against DSN has no effect on this forfeiture application because in my view, even though the court in this application must also for all intents and purposes make a finding on whether the same offence under s 23 of the MACC Act has been committed (in other words, whether unlawful activity is proved), that determination is only to be undertaken on the basis of the standard of proof of on a balance of probabilities. This has been made clear in s 56(4) of the

AMLATFPUAA, as mentioned earlier. A

[40] However, on the totality of the affidavit evidence and the exhibits deposed by the deputy public prosecutor and both the investigating officers of the predicate and the money laundering offences, in my judgment, it appears that the case on the commission of an offence under s 23 of the MACC appear to be lacking in terms of the adequacy of substantiation and other extrinsic evidence. B

[41] The said affidavits and the documents exhibited thereto merely demonstrate the evidence of the involvement of the DSN in matters pertaining to 1MDB. But there were no affidavits, for example, by any other parties involved in the management of 1MDB to enable a reasonable inference be made that DSN had in fact abused his position at the material times and thus committed an offence under s 23 of the MACC Act. C D

[42] It is not erroneous to contend that the depositions of monies — particularly considering its very large sum — into DSN's accounts may well have given rise to serious questions about the legality of the source and of the transfer transaction itself. But it is arguable whether these facts per se, and without more, are sufficient to establish the required elements of the predicate offence of s 23 of the MACC Act. E

[43] It has not been shown that the monies in question which had been received by DSN from the various entities as stated in the relevant affidavits is as a result of his office or position, as the Chairman of the Board of Advisors of 1MDB or as the Minister of Finance or from any action or decision taken by DSN in any of these capacities. It bears repetition that it has not been demonstrated how DSN had used his position for gratification or money laundering other than merely showing that DSN had received monies from various entities unrelated to his public office without in any event any clear evidence of impropriety. F G

[44] There is no explanation or reasons proffered in the affidavits to arrive at the conclusion that the impugned monies received by DSN from these various entities are gratification from any use of office or position within the scope of s 23 of the MACC Act. No detailed narrative was given as to the investigations conducted and the sources of information which satisfied the applicant that the predicate offence under s 23 of the MACC Act has been committed or that the monies in the accounts of DSN are the proceeds from an unlawful activity. H I

[45] Just to name one crucial aspect, even the money trail between 1MDB and DSN has not been established, in the absence of any documents to show that monies were transferred from first, the bank account of 1MDB Energy Ltd

to the bank account of Aabar Investment PJS Ltd; secondly from the bank account of Aabar Investment PJS Ltd to the bank account of Blackstone Asia Real Estate Partners; and thirdly, from 1MDB Global Investment Ltd to Tanore Finance Corp, with the result that the applicant has not to the satisfaction of this court discharged its burden of proving that the monies received by DSN from Blackstone Asia Real Estate Partners and from Tanore Finance Corp are in any manner connected to 1MDB.

[46] Insufficiency of evidence cannot justify this court being satisfied that the requirements of s 56(2) of the AMLATFPUAA have been met in order to grant an order for forfeiture. Again, the Court of Appeal decision in *Kuala Dimensi* is of relevance, where it is stated as follows:

> [124] In the case of *Pendakwa Raya v Abdul Razak and Ors* [2009] MLJU 195; [2009] 1 LNS 322, there was an application for forfeiture under s 37(3) of the Anti-Corruption Act 1997. In this case the judge accepted that 'satisfied' must mean 'being reasonably satisfied on the facts of the case'. It cannot import an arbitrary or irrational state of being satisfied. Satisfaction must be honest, careful and deliberate, arrived after exercising due care and caution. The question of satisfaction is however a question of fact.
>
> [125] In the case of *Tan Teik Soon & Ors v Public Prosecutor* [2004] 2 MLJ 608, there was an application for forfeiture under s 6(4) of the Betting Act 1953. The judge had to be satisfied that the money sought to be seized was used, or intended to be used for wagering. In this case, the court was also of the view *that there must be sufficient facts and evidence before the judge before he can form an opinion that the properties seized was either used or intended to be used in the commission of the predicate offence*, which in this case was betting/wagering. In this case an expert report was tendered to establish that the money was connected to the predicate offence. Additionally there was a plea of guilt without qualification by the persons charged. On these facts an order for forfeiture was made.

[47] The Court of Appeal in *Kuala Dimensi* also helpfully stated the types of facts and evidence that would be necessary to be furnished in order to satisfy the court hearing a forfeiture application to grant an order to such effect. The relevant passages from the judgment reads as follow:

> WHETHER THE CONDITIONS IN S 56 OF THE AMLATFA HAS BEEN ESTABLISHED
>
> [69] It is trite law that an application made under s 56 of the AMLATFA requires proper proof of relevant facts which in turn must be supported by admissible evidence (refer *Public Prosecutor v Thong Kian Oon & Ors* [2012] 10 MLJ 140; [2012] 8 CLJ 119). This is to enable the court to arrive at a correct decision since the court is not merely exercising a ministerial or executive character when adjudicating a s 56 application.
>
> [70] From our perusal, we find that the PP through the investigating officers merely produced via their affidavits allegations of facts and charges brought against third

parties (Datin Paduka OC Phang, Law Jhen Dong, Bernard Tan and Stephen bin Abok) who have all been acquitted and discharged.

[71] At the same time, the PP had failed to disclose and provide the names, identity and sources of information that they had received and relied upon and the reasons for their belief in such information and the involvement of each of the respondents to these charges. This is relevant since the PP had submitted that the four accused on a balance of probabilities had committed money laundering. If the four accused had committed money laundering, then in what manner has all the respondents abetted them.

[72] The investigating officers have also failed to disclose all of the documents relied upon by them in coming to their conclusions or as to their reasons for having relied on the documents as being a true reflection of the facts alleged.

[73] Accordingly, it is impossible for the PP to have 'been satisfied' that the bringing of the application was appropriate, under the circumstances. The PP should have set out in Saifuddin's first affidavit the evidence that he relied on to 'satisfy himself' that:

(a) there are predicate offences committed by the four accused; and

(b) that the proceeds derived therefrom had been used in the commission of an offence of money laundering.

...

[80] Further, we agree with the High Court judge that the PP has also failed to identify the nature and extent of the participation of the respondents with the offence of money laundering. Since the PP has argued that the four accused had committed money laundering, the PP has also failed to show in what manner the respondents has abetted the four accused.

[81] In this context, IO Supt Rajagopal has not tendered any other substantive evidence to support his findings that an act of money laundering has been made out under items (a), (b) and (c) of the definition of money laundering under s 3 of the AMLATFA. IO Supt Rajagopal has also not laid down the factors which give rise to the inference of intent or *mens rea* as described in items (aa) and (bb) of the definition of money laundering under s 3 of the AMLATFA.

[82] Instead, in his affidavit, IO Supt Rajagopal, simply begins most of his averments by saying that 'my investigation reveal that ...'. IO Supt Rajagopal, also does not describe whose statements were taken as part of his investigation and what were the effect and purport of the said statements. IO Supt Rajagopal, also has failed to tender or describe the nature and contents of any of the statements that he recorded under the AMLATFA.

[83] The situation would have been different had the PP adduced the statements that were recorded to prove the predicate offence under s 32(2) of the AMLATFA which reads as follows: ...

[48] Failure on the part of the applicant to provide sufficient disclosure of the evidence about the entirety of the matters relevant to the alleged offence under

s 23 of the MACC Act does little to establish the commission of the predicate offence. Simply put, from the affidavits filed in this application, the nexus between DSN's involvement in matters pertaining to 1MDB and the subsequent depositions of monies into his accounts is tenuous such that as reminded by the Court of Appeal in *Billion Nova* above, it plainly cannot be said that the predicate offence under s 23 of the MACC Act has been committed. If the predicate offence is not proved, the issue of proceeds deriving therefrom does not arise.

The monies had been received by the respondent for valuable consideration in good faith

[49] In any event, it is unnecessary for me to make a definitive conclusion as to whether the predicate offence has been committed because as I have stated earlier, an order for forfeiture under s 56 shall be made by the court not only if the property sought to be forfeited is the subject-matter or proceeds of a money laundering or an unlawful activity, but there must also not be a purchaser in good faith for valuable consideration in respect of the property.

[50] In my view this forfeiture application cannot in any event succeed due to the fundamental reason that the respondent has successfully shown that the respondent's monies in Account B which had been seized by the applicant and now intended to be forfeited in the instant application were monies or property which the respondent had received as valuable consideration in good faith for the sale of jewellery to DSN in the course of the respondent's legitimate business as a jeweller.

[51] Having examined the relevant affidavits as well as the documents exhibited thereto, even if the monies were considered to be proceeds of an unlawful activity (which as I stated above has not been proven), the respondent has, I reiterate, demonstrated that that monies which it had received from DSN now sought to be forfeited by the public prosecutor as the applicant were received by the respondent for valuable consideration in good faith for the lawful sale and purchase of jewellery in the ordinary course of the business of the respondent.

[52] This is because firstly, contemporaneous documentary evidence such as the very receipts evidencing the sales of the jewellery in 2014 had been produced by the respondent. The applicant did not even dispute this sale transaction. This averment by the respondent was not rebutted by way of affidavit by the applicant such that the assertions by the respondent remain not contradicted and deemed admitted (see the leading Court of Appeal decision in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281). As such, the averment that the monies received by the respondent from DSN were for

lawful and legitimate purposes for the sale and purchase of jewellery is deemed admitted.

[53] Secondly, I accept the assertion that the respondent did not know and had no reason to believe that the impugned monies received from DSN were proceeds of any unlawful activity, if at all. There is no evidence that the financial institutions for both the payer bank account and the recipient bank account which effected the release of the RM100,000 from DSN's account to that of the respondent's Account B had raised any concerns in respect of the cheque deposit transaction.

[54] This is especially given that the approved financial institutions at which the accounts of DSN are maintained, out of which the cheque payments were made to the respondent and deposited into Accounts A and B, namely AmIslamic Bank Bhd and RHB Bank Bhd, being 'reporting institutions' under the AMLATFPUAA (with duties to conduct proper customer due diligence or enhanced customer due diligence) had allowed the funds in DSN's bank accounts to be released into the respondent's bank accounts.

[55] Thirdly, the transaction on the sale of the jewellery by the respondent to DSN was undertaken in the year 2014 which was certainly prior to the allegations on the role of DSN concerning 1MDB being made public in the middle of 2015.

[56] Fourthly, there is also no allegation of collusion or any form of wrongdoing made by the applicant against the respondent.

[57] The applicant however argued that the respondent ought to have reason to suspect the financial sources of DSN as a *Politically Exposed Person* which did not comply with Bank Negara Malaysia ('BNM')'s Anti-Money Laundering guidelines. The allegation was also that the respondent failed to update its anti-money laundering policy dated 1 June 2010 to include provisions on *Politically Exposed Person* which could have examined the transaction involving a government leader such as DSN. I disagree.

[58] Adherence to BNM guidelines on money laundering, updated or otherwise, cannot be a prerequisite to be taken into account for the purposes of this application. It is merely an issue of compliance as required by BNM. It may however be relevant for purposes of determining presence of 'good faith' on the part of the purchaser for valuable consideration of the property sought to be forfeited under s 56(2). But in the instant case, this cannot be of much significance if at all.

[59] This is because there was simply, as just stated, no basis or reason for the

respondent to suspect the legitimacy of DSN's income and sources of funds. After all, it is in affidavit evidence that the sale and purchase transactions of the jewellery in the value of above RM100,000 are very common in the respondent's line of business.

[60] It bears repetition that it is a reasonable proposition to make that at the material time in 2014, one would not have ordinarily inquired of DSN, the Prime Minister of the country then, as to his source of income or his financial capability to afford a purchase of the jewellery. And again, this was before the controversy concerning the flow of monies into DSN's personal account vis a vis the 1MDB controversy became public, and that in any event the flow of funds into Account A and B were allowed to have taken place by the banks involved.

[61] Accordingly, even if it is assumed that the RM100,000 seized from Account B of the respondent was proceeds of unlawful activity, and that it was paid by DSN into the said account of the respondent, in my judgment, on a balance of probabilities it cannot be concluded that the court is satisfied under s 56(2) that the said sum in that account now sought to be forfeited was not received by the respondent in good faith for valuable consideration.

[62] The respondent has successfully discharged the burden of showing that the monies were derived from legitimate sources in the course of its business and the applicant has failed to reply or rebut meaningfully with any evidence that such monies were not received by the respondent in good faith and for valuable consideration.

[63] As such, on this ground alone (if not also the failure on the part of the applicant to establish the commission of the predicate offence by DSN) no order of forfeiture as applied for can be granted.

[64] For completeness I should add that the provision states that order for forfeiture cannot be made if there is a purchaser in good faith for valuable consideration in respect of the property. In the context of s 56, in my view, the 'purchaser' must refer to the recipient of the property or proceeds of unlawful activity. Which in this case is the respondent. If it can be shown, by the recipient respondent that the property is received in good faith in the context of a transaction as a valuable consideration, then a forfeiture cannot be ordered.

[65] The term 'purchaser' cannot refer to any other party because such other party would if any come within the ambit of third party claimants under s 61 of the AMLATFPUAA in respect of whom a third party notice had in the instant application been earlier issued to notify any potential parties who sought to stake a claim in the monies intended to be forfeited by the applicant

to appear in court for such purpose. As stated earlier in this judgment, there was absolutely no response to this notice. Nobody attended court on the specified date and time.

The respondent had no involvement in the commission of any offence and did not aid or abet any such offence

[66] Given that the respondent has successfully shown that forfeiture cannot be ordered by this court against the RM100,000 in Account B because of either one or both of the two grounds discussed earlier, it is unnecessary for me to analyse the other two reasons for its opposition to this forfeiture action. I will, however, for completion deal with them in summary fashion.

[67] The respondent also submitted that there is no evidence whatsoever that has been shown by the applicant that the respondent was in any fashion involved in the commission of any offence, specifically either the predicate offence or the money laundering offence itself, or that the respondent had aided or abetted in the commission of any such offence.

[68] It is true that the applicant has not offered any such evidence. Indeed, the only reason the applicant has filed this forfeiture application against the respondent is that the respondent had in its Accounts A and B received the payments from DSN. The applicant has not alleged any wrongdoing on the part of the respondent.

[69] I should however point out that the invocation of s 56 of AMLATFPUAA does not require that the recipient of the proceeds from unlawful activity must somehow have colluded or involved in the wrongdoing related to the commission of the predicate offence or the money laundering offence.

[70] The respondent's allusion to *Kuala Dimensi* as the authority which states that the recipient of the property subject to a forfeiture application under s 56 of AMLATFPUAA must have been involved in the aiding and abetting the money laundering or predicate offence is misconceived. A forfeiture can be ordered when the recipient is wholly innocent (see further the discussion on the distinction between civil and criminal forfeiture below).

[71] And again, the Court of Appeal in *Kuala Dimensi* did state the following:

> [56] Following from the above, and the affirmative deposition made by the PP in our instant case, it is incumbent upon the PP to make clear to this court, in its application for forfeiture under s 56 of the AMLATFA the following elements:

(i) the existence of a predicate offence, the evidence and basis upon which the commission of the offence has been established;

(ii) identify the proceeds or 'the subject-matter of' the predicate offences that are in the custody of the respondents;

(iii) since the DPP has admitted that the four accused had committed money laundering, then in what manner the respondents have abetted them.

...

[80] Further, we agree with the High Court judge that the PP has also failed to identify the nature and extent of the participation of the respondents with the offence of money laundering. Since the PP has argued that the four accused had committed money laundering, the PP has also failed to show in what manner the respondents has abetted the four accused'.

[72] The explanation to this is simply that *Kuala Dimensi* was decided on the basis of the law before it was amended to the present AMLATFPUAA. The Anti-Money Laundering, Anti-Terrorism Financing Act 2001 ('the AMLATFA') was amended to AMLATPUAA in pursuance of PU (A) 1467 with most of the provisions coming into force from 1 September 2014.

[73] One key distinction between the former and present law in respect of s 56 is the status of the property sought to be forfeited. As set out earlier, s 56(1) and (2) of the AMLATFPUAA states as follows:

(1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is —

(a) *the subject-matter or evidence relating to the commission of such offence*;

(b) terrorist property;

(c) *the proceeds of an unlawful activity*; or

(d) the instrumentalities of an offence.

(2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied —

(a) that the property is —

(i) *the subject-matter or evidence relating to the commission of an offence under subsection* 4(1) or a terrorism financing offence;

(ii) terrorist property;

(iii) *the proceeds of an unlawful activity*; or

(iv) the instrumentalities of an offence; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

[74] In contrast, s 56(1) and (2) of the former AMLATFA read as follows:

(1) Subject to s 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under sub-s 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that *such property had been obtained as a result of or in connection with an offence under sub-s 4(1)* or a terrorism financing offence, as the case may be, or is terrorist property.

(2) The judge to whom an application is made under sub-s (1) shall make an order for the forfeiture of the property if he is satisfied:

(a) *that the property is the subject-matter of or was used in the commission of an offence under sub-s 4(1)* or a terrorism financing offence or is terrorist property; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

[75] Section 56 in the AMLATFPUAA has expanded the premise concerning the status of the property which is applied to be forfeited. This was clearly explained in the judgment written by Suraya Othman JCA in *Kuala Dimensi* as follows:

[39] As can be seen, before the amendment under AMLATFA, the PP may seize the property under sub-s 56(1) solely on the ground that if he is satisfied that such property had been obtained as a result of or in connection with an offence under sub-s 4(1) or a terrorism financing offence, or is a terrorist property. The amended s 56(1) under AMLATEPUA retained these conditions in the new s 56(1)(a) and (b) and added two more conditions for seizure that is, if such property is (c) the proceeds of an unlawful activity or (d) the instrumentalities of an offence. It is to be noted that s 56(1)(a) of AMLATEPUA uses different terminology. Instead of 'had been obtained as a result of or in connection with' (as in AMLATFA), the new terminology used is 'the subject-matter or evidence relating to the commission of' such offence.

[40] Similarly, previously before the amendment, under AMLATFA, a judge to whom an application is made under sub-s (2), shall only make an order for forfeiture of the property if he is satisfied that the property is the subject-matter of or was used in the commission of an offence under sub-s 4(1) or a terrorism financing offence or is a terrorist property. The amended s 56(2) under AMLATEPUA retained these conditions in the new s 56(2)(a)(i) and (ii) and added two more conditions for forfeiture, that is, if the property is (iii) the proceeds of an unlawful activity or (iv) the instrumentalities of an offence.

A [41] It would seem that the two new conditions added by the amendment (under AMLATEPUA) in allowing the property to be seized or forfeited respectively on the basis that the property is the proceeds of an unlawful activity or the instrumentalities of an offence, has made the burden thrust upon the PP and the judge lighter or easier in that they are given a further choice under which category B the property can be seized or forfeited. Previously under AMLATFA, the PP may only seize property solely on the grounds that if such property had been obtained as a result of or in connection with an offence under sub-s 4(1) and the judge likewise, shall only order for forfeiture solely on the ground that if the property is the subject-matter or was used in the commission of an offence under sub-s 4(1). *But* C *with the amendment under AMLATEPUA there are four categories available and the last two categories, especially category (c), that the property is the proceeds of an unlawful activity has departed the emphasis of seizure and forfeiture from the attachment of guilt or otherwise on any person under s 4(1) to the emphasis on the legal status of the property itself.* See this court's case of *Noor Ismahanum Mohd Ismail v Public Prosecutor* [2018] MLJU 205; [2018] 10 CLJ 597, Criminal Appeal D No S-05-39-01-2016.

...

[46] The scenario is different under sub-s 56(1) of the AMLATEPUA. The PP may seize the property if he is satisfied that any one of the four conditions as in (a), (b), E (c) or (d) are met. He is not encumbered as under AMLATFA to show that his satisfaction must rest solely on the fact that the property had been obtained as a result of or in connection with an offence under sub-s 4(1).

[47] Likewise, under sub-s 56(2) of the AMLATPUA. The judge shall make an order for forfeiture if he is satisfied that any one of the four conditions in (a), (b), (c) F or (d) are met. *The judge is not encumbered as under AMLATFA to show that his satisfaction must rest solely on the fact that the property is the subject-matter or was used in the commission of an offence under sub-s 4(1). As stated earlier, the introduction of the other two conditions in s 56(1) and (2) of AMLATEPUA, especially category (c) has made the burden thrust upon the PP and the judge to seize or to forfeit respectively,* G *lighter or easier in that the emphasis is no longer on the attachment of guilt or otherwise of any person under s 4(1) but instead on the legal status of the property itself.*

[76] The present forfeiture application before me, unlike the situation in *Kuala Dimensi*, is made under s 56 of the AMLATFPUAA. Although H unfortunately lacking in specificity, the notice of motion of the applicant, its affidavits and written submissions in the instant application do make reference to the property sought to be forfeited as proceeds of unlawful activity or of an offence of money laundering, which in my view fall within the ambit of s 56(1)(a) and (c), and 56(2)(a)(i) and (iii) of the AMLATFPUAA.

I

[77] This in turn plainly means, as was observed in *Kuala Dimensi* that the emphasis is no longer on the attachment of guilt or otherwise of any person, but instead on the legal status of the property itself. This is manifest from the literal and ordinary meaning of the language of para (c) of s 56(1) and para (iii)

of 56(2)(a) of the AMLATFPUAA, that the property in dispute is — *the proceeds of an unlawful activity.*

[78] The situation in *Kuala Dimensi* was then governed by s 56 of the AMLATFA which required that the property be shown to be the subject matter or had been used in the commission of a money laundering offence. This, on the basis of the provision of s 56 of the AMLATFA, given its own set of facts, suggests that the respondents as the recipients of the property in that case ought to be proved to have abetted the commission of the offence.

[79] This, in my view is the reason why the Court of Appeal in *Kuala Dimensi* stated that the applicant had failed to show in what manner the respondents had abetted the four accused in the commission of a money laundering offence.

The applicant has failed to show which monies were from illegal as compared to legitimate sources as they have mixed

[80] The respondent here further argued that the applicant is not able to show that the monies sought to be forfeited from Account B were from illegitimate sources, because first, the account statement of the relevant account of DSN recorded that the impugned monies received by DSN had mixed with the funds from various other sources, and these funds from other sources have not been challenged by the applicant. It thus follows, according to the respondent, that it has not been established that the monies in turn received by the respondent, as deposited in Account B, although from DSN, were in any manner at all tainted as proceeds of an unlawful activity.

[81] Secondly, the bank statements of the respondent itself, as exhibited to its relevant affidavit, for a period from June 2014 to June 2019 show that there have been many and various if not countless business transactions throughout the five years. This shows that the impugned monies received from DSN have further co-mingled with the respondent's own legitimate monies. Indeed, the applicant itself has admitted that the funds of the respondent's account have mixed with the monies from DSN.

[82] On the authority of the Court of Appeal decision in *Kuala Dimensi* it is for the applicant to identify and separate the alleged unlawful proceeds from the respondent's lawful funds. It was in that case held thus:

> [117] It is a fact that all these money were mixed together with other money and are obviously no longer in the account of KDSB. The money paid to KDSB for the drainage and water supply works and the 33KV electrical works are mixed together with other money legitimately earned under DA1, DA2, ADWA, NADWA and various other development contracts undertaken by WBSB and WBCSB.

A [118] It has to be pointed out that IO Supt Rajagopal's complaints relate to money that were paid to KDSB from 2004 to 2008. It is not possible to identify these money and then separate them from all the other money legally earned under these contracts and other contracts over the years.

B [119] For the reasons mentioned above, it is clear that the PP has not established, on a balance of probabilities, that the money and property seized had been obtained as a result of or in connection with an offence under sub-s 4(1) of AMLATFA.

C **[83]** In my view, in the instant application before me, for the reasons stated above, this has not been established. This means that the nexus between the proceeds attributed to DSN from the predicate offence (if at all) and the monies sought to be forfeited is manifestly conspicuous in its absence. The applicant has again here not succeeded to discharge its burden of proving on the balance of probabilities that the monies sought to be forfeited are proceeds of an unlawful activity or the subject-matter or evidence relating to a predicate offence.

D

Important observations — This is civil forfeiture, not criminal forfeiture

E **[84]** The key issue in this application is that this is a forfeiture action. It is a civil forfeiture action. This has been affirmed in *Kuala Dimensi*. It is a legal proceeding targeted at confiscating or forfeiting the property which the enforcement agency contends to have been involved in certain criminal activity or in the context of the present application, being proceeds of an unlawful activity. In a civil forfeiture action, it is not necessary that any person should be prosecuted for the criminal activity. This is also consistent with the opening words of the provisions of s 56 of the AMLATFPUAA set out above which in fact stipulate that s 56 is applicable only if there is no prosecution.

F

G **[85]** As such in a civil forfeiture proceeding if the party whom the public prosecutor alleges had received the property can show that the said property from the unlawful activity is like presently are monies which the party received as a valuable consideration in good faith in the ordinary course of its legitimate business, it means that the property cannot be forfeited from that recipient.

H

[86] Also, it is not correct to say that even though the property is received as a valuable and legitimate consideration, since the property is in fact proceeds of unlawful activity (if so established), the recipient must rightfully without any qualification return or compensate and make good of the same to the public prosecutor.

I

[87] That is not the law, and there are no requirements under s 56 which authorise the court to make such a direction. At the same time this court also takes cognizance of the provision of art 13 of the Federal Constitution which

prohibits any person from being deprived of property save in accordance with the law. A

[88] The fundamental point is this specific provision in s 56 of the AMLATFPUAA concerns only forfeiture. It is not the law enacted to penalise whoever had used proceeds of unlawful activity. Neither is s 56 a recovery action or an action for damages. B

[89] It is even irrelevant whether the recipient had colluded with the party who had first given the property to the recipient. That is for the public prosecutor to consider instituting criminal charges for offences he deems have been committed. Similarly, if the recipient is entirely innocent, the focus is only whether he is still in control of the property to enable forfeiture. As highlighted by the Court of Appeal in *Kuala Dimensi*, given the amendment to s 56 in AMLATFPUAA, the public prosecutor may focus less on the culpability of a person (in my view, especially the recipient) but more on the status of the property applied to be forfeited. C D

[90] This has been made even more manifest by another decision of the Court of Appeal in *Noor Ismahanum Mohd Ismail v Public Prosecutor* [2019] 2 MLJ 536; [2018] 10 CLJ 597 where Abdul Rahman Sebli JCA (as he then was) said: E

> [15] The judge's primary concern in an application under s 56(1) is with the legal status of the property, not the guilt or otherwise of any person under s 4(1)(a) of the AMLATFA. He must order for forfeiture if the property falls under para. (i) or (ii) or (iii) or (iv) of sub-s (2)(a). F
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> [16] In the context of the present case, what the learned JC had to determine was whether the property was 'the proceeds of an unlawful activity' within the meaning of para (a) (iii) of s 56(2) and not whether any person had been convicted or acquitted of an offence under s 4(1)(a) of the AMLATFA although the fact of such conviction or acquittal was relevant under s 76. G
>
> [17] In determining whether the property is 'the proceeds of an unlawful activity', the standard of proof to be applied by the judge is the civil standard of proof, ie proof on the balance of probabilities, as stipulated by ss 56(4) and 70(1). This standard of proof must not be mistaken for proof beyond reasonable doubt, which is the heavier standard of proof that the Public Prosecutor is required to discharge in order to bring home a criminal charge against any person, such as a charge under s 4(1)(a) of the AMLATFA. H

[91] Importantly, this s 56 of AMLATFPUAA is to be contrasted with s 55 of the same Act. For the latter is enacted essentially for the forfeiture of property from the person who has committed the predicate offence, when the offence is proved against him. I would consider s 55 of the AMLATFPUAA to be an example of a criminal forfeiture provision. In criminal forfeiture, generally the I

State would confiscate and forfeit the impugned property usually after securing a conviction. It is an action brought as a part of the criminal prosecution of an accused person.

[92] It is in my view correct to characterise criminal forfeiture as an action in personam (against the person) in contradistinction to civil forfeiture, such as enshrined in s 56 of the same Act, which is an in rem (against the property) action.

[93] It is apposite that I set out s 55 in full, which reads as follows:

> 55 Forfeiture of property upon prosecution for an offence
>
> (1) Subject to section 61, in any prosecution for an offence under subsection 4(1) or a terrorism financing offence, the court shall make an order for the forfeiture of any property which is proved to be —
>
> (a) the subject-matter or evidence relating to the commission of such offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence,
>
> where —
>
> (aa) the offence is proved against the accused; or
>
> (bb) the offence is not proved against the accused but the court is satisfied that-
>
> (i) the accused is not the true and lawful owner of such property; and
>
> (ii) no other person is entitled to the property as a purchaser in good faith for valuable consideration.
>
> (2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, diminished in value or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to, in the opinion of the court, the value of the property, and any such penalty shall be recoverable as a civil debt due to the Government of Malaysia and shall not be subject to any period of limitation prescribed by any written law.
>
> (3) In determining whether the property is —
>
> (a) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence,
>
> the court shall apply the standard of proof required in civil proceedings.

[94] Now crucially, it will be readily observed that s 55(2) provides that if the property in question has been disposed of, diminished in value or cannot be traced, the court shall order against the accused a penalty sum which is equivalent to the value of the property and any such penalty to be recoverable as civil debt due to the government.

[95] This s 55 underscores the point that one who commits the offence may or must be made to return or compensate for the property involved in a criminal activity or proceeds of an unlawful activity, plain and simple.

[96] Significantly, as I intimated earlier, there are no similar powers under s 56 of the AMLATFPUAA (which is the basis of the forfeiture now before me) for this court to compel that recipient of the proceeds of the unlawful activity (if so established) to pay compensation or return the monies of equivalent value in situation where the impugned property or in this case the proceeds of the unlawful activity (alleged here to be the RM100,000 or any part thereof) was received by the recipient in good faith as a valuable consideration for the sale by the recipient respondent of jewellery to DSN in the course of its legitimate business.

[97] It can also be argued that if the applicant takes the view (erroneously I should add) that any recipient must return the proceeds of unlawful activity even if it has been shown to be received by the recipient in good faith as a valuable consideration, the applicant should have also asked for the forfeiture and compensation of the entire RM90,000 from Account A, notwithstanding that it has since depleted to less than half of RM1,000 remaining in that Account A. Instead the applicant chose to withdraw its forfeiture action in respect of Account A.

[98] However, if the respondent as the recipient had knowledge that the proceeds it received were from unlawful activity (if so established) reliance on the ground that it was received as valuable consideration would likely not be possible since the receipt was not made in good faith as required under s 56(2). Thus in that event, provided other requirements are fulfilled, forfeiture may still be ordered by the court.

[99] And at the same time if the recipient had knowingly received proceeds of unlawful activity (if so established) as consideration for the sale, it is again also open for the public prosecutor to consider filing criminal charges against the recipient for its involvement in a criminal activity, if any. If he is an innocent recipient, in a situation of the proceeds being received as valuable consideration in good faith, there is nothing that the authorities could do as against this property in this specific context of a forfeiture proceeding under s 56 of the AMLATFPUAA.

A CONCLUSION

[100] In view of the foregoing reasons, in my judgment I am not satisfied that the requirements under s 56 of the AMLATFPUAA have been met to justify the granting of an order for forfeiture as applied for. This application must therefore be dismissed.

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Application dismissed.

Reported by Mohd Kamarul Anwar

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